

1 honest about where they were living. You'll read the
2 report of Dr. Starling and you'll see that that report
3 was given to the step grandmother, not the mother.
4 And after some doing the mother never would admit that
5 she wasn't living with the children. The children
6 went to Virginia to live with the step grandmother
7 along with several cousins and you heard those names
8 of all the other cousins that were living with the
9 step grandmother.

10 This was written on April 13 of this year by
11 Dr. Starling. History provided by maternal step
12 grandmother, that's Ms. Hepner, you'll have this. She
13 states that Lillian and two siblings have lived with
14 her since June of '99. That's what the step
15 grandmother says. She reports Lillian's mother lives
16 locally with a new husband. Ms. Hepner states she has
17 concerns with her stepdaughter's judgment and feels
18 the girls need the stability and support she can
19 provide. Now what do you think is going on when the
20 stepmother has had these children and giving a bad
21 report about the mother? At the same time support
22 petitions are being filed and other things are going
23 on. And then they get up here and they will not even
24 acknowledge to you that the children are living with
25 the step grandmother. She wanted you to believe that

1 somehow she lived with the step grandmother up until
2 she got married in April. Well, that's not what the
3 step grandmother told the doctor and it is, you've got
4 it right there.

5 And there's some other things in there, when
6 you try to jive some of what was said against what is
7 written and what you've heard you can't do it.

8 So let's take the case of Lillian.
9 Lillian's medical report. Now you'll notice that Dr.
10 Anz never examined Lillian. She only examined Autumn.
11 Now you have to ask yourself why that is. I'll tell
12 you why it is, because they knew that the examination
13 in Virginia showed that there were normal exams, which
14 is what it shows. That's the reason they didn't have
15 Dr. Anz check Lillian. Lillian, who claimed that she
16 had been sodomized and raped and you'll recall the
17 testimony, I mean the statement that was read by Ms.
18 Moss, is was more than every day, is was more than
19 several times, it was a bunch of times, everything was
20 a bunch of times. And the medical report found there
21 was no physical evidence to support what the girl
22 said.

23 Now we come to Autumn. The medical reports
24 will show that Autumn, there was nothing abnormal, she
25 had a normal reading or a normal examination as to the

1 anus, which is contrary to her statement that she was
2 penetrated on a regular basis. Now we come to the
3 other charge there that Autumn says she was penetrated
4 vaginally or in her pie. Now, you'll have the records
5 and I went over this carefully with, well I went over
6 it with Dr. Anz and then went over it again with Dr.
7 Bush about the time. Now to make a long story short
8 and boil it down to this and some of you know what I'm
9 fixing to say and I think all of us common sense will
10 tell us this. The little girl bled, had a laceration
11 and bled for we know for six days. And we know on
12 March 8th of 1999 she was hurt on March 3rd, and we
13 have two different dates when she was hurt, but it
14 says Wednesday, and Wednesday was March 3rd.
15 Wednesday, Thursday, Friday, Saturday, Sunday, Monday,
16 which is the 8th, that's six days that she bled. And
17 she was still bleeding on the sixth day on the 8th of
18 March when that report was written. She had scarring
19 and she had bruises. Now the question is a simple
20 question. You will recall that Autumn said the doctor
21 said it was a straddle injury. You probably remember
22 that, but whatever she says. The doctor said it was
23 a straddle injury and Dr. Starling makes a note of
24 that although he had never seen the emergency room or
25 the report from the clinic. He notes that it was

1 reported as a straddle injury.

2 Of course on that Sunday Dr. Anz was so over
3 zealous that she was willing to agree with another
4 doctor without knowing whether it was a male or a
5 female or having ever having seen the report.

6 The simple fact is and the question is this:
7 Having no physical evidence of sodomy when there
8 should be some if you believe the girls, and no
9 physical evidence of rape on one of them, her hymen is
10 still intact, the girl has a perfectly normal reading.
11 And the other one, no physical evidence on the anal,
12 should be if you believe what they said. Then we get
13 to the vaginal problem where there was an abnormal
14 reading. Now the question is, and this is the one
15 that Dr. Anz crawled on when I asked her, based on
16 a reasonable medical certainty, question: Based on a
17 reasonable medical certainty is it more certain that
18 this kind of injury, a person bleeding six days or
19 more, would more likely come from a trauma of falling,
20 a straddle injury, falling on something which caused
21 that injury and caused the laceration and bruising and
22 scarring, is that most likely to have come from a fall
23 or is it more likely to come from the story that the
24 girls said? And what did she say? One time, it's the
25 only time she claimed that she was attacked vaginally.

1 Autumn said one time he was trying to do it in my rear
2 and it slipped and hit my vagina and he didn't mean
3 to. And the question is, is it possible that that
4 produced a scar and bruising and a laceration that
5 caused bleeding for six days? And we don't know how
6 many more days because the last report was on the 8th.

7 I think, ladies and gentlemen, you can
8 believe because Dr. Anz wouldn't give a straight
9 answer to that question, that medical question, Dr.
10 Bush told you that based on a reasonable medical
11 certainty that that would have occurred from the fall
12 or the straddle injury and could not and would not
13 have occurred if you believe the second story.

14 So what's the importance of trying to get
15 facts? You see Ms. Moss had the same problem. And we
16 find out from the State what is your purpose of
17 getting all these records from Mr. Healy. Well our
18 purpose is to have a successful conviction and
19 successful prosecution. Then we get Ms. Moss who
20 talks to the girls, one for forty minutes and one for
21 forty-five minutes, and it's not compared with
22 anything else they've said or any physical facts.
23 Didn't even ask them what time this occurred. Failure
24 to get facts that can be verified so the State can
25 take away the reasonable doubt which they are required

1 to remove, because you can't just send somebody or
2 convict somebody for these kind of things with this
3 kind of testimony because it is not beyond a
4 reasonable doubt. You'd have to assume something,
5 you'd have to add to something, you'd have to believe
6 that notwithstanding the fact there's no physical
7 evidence that it happened anyway. You'd have to
8 believe that the fact that these girls have, you know
9 they changed their story. And you know Autumn can
10 change a story because she did change her story.

11 And we get to secrecy. David mentioned that this
12 was a secret thing and secrecy. There are two secrets
13 in these kind of cases and the one we're dealing with
14 here is the secret of why these girls are doing this.
15 That's the secret. What's the secret behind why they
16 got it wrong, why Autumn got it wrong on what the
17 facts were when she was talked to and the testimony
18 transcribed up in Virginia? Was that because she
19 forgot it or because there was a secrecy of what these
20 girls plotted together or what their mother influenced
21 them to say? We don't have to guess that they plotted
22 together because I got it, it came right off this
23 witness stand. Right off this witness stand. It's
24 not often that you can see that happen before your
25 eyes on something so obvious they can be checked.

1 They knew there was a problem with the time and they
2 wouldn't admit, even Dawn wouldn't admit when he
3 worked and wouldn't admit when she worked and didn't
4 even know when the school but left every morning, had
5 to bring Matthew on to get that straight. That during
6 the whole time she was living here and those kids were
7 going to school and catching that school bus which is
8 a timing question, she didn't know what time they got
9 up and what time they caught the school bus. Well, if
10 she had remembered it you know, it would have been
11 obvious that they had a problem time-wise. But it's
12 obvious they have a problem time-wise anyway.

13 Now ladies and gentlemen, I know that you
14 have paid close attention to this case and I know some
15 of you and I know you probably know more about the
16 facts than I do, so I know you remember the facts and
17 you remember what people have said. And all I can
18 urge upon you is a conviction in cases like this
19 should not be based on this kind of thing. Now while
20 it's possible to have sexual abuse without physical
21 findings, it is not possible, for example, it's not
22 possible to prove or disprove other than whether you
23 believe somebody or not, whether somebody touched
24 somebody without penetration. We can't disprove that.
25 I can't prove and Lee can't prove that he was never at

1 home with these girls. That would be untruthful.
2 Obviously he was at home with these girls but he
3 wasn't there during the time or at the time when they
4 said these things happened. He wasn't home during
5 those times of the day.

6 He looked after these girls, he looked after
7 them at Christmas and you hear from, you know,
8 Matthew, he baby-sat with Matthew. He's had people
9 come here and testify and stand behind him and you can
10 believe what they've said and I don't think you can
11 believe what the girls said. And when you read
12 through some of this, for example, part of the history
13 on Autumn is that she had a jagged tear in her
14 genitals, which the physicians attributed to a
15 straddle injury. Now that's in the medical report.
16 Now, you get doctors who write things down but they
17 never ask the question and don't say here, based on a
18 reasonable medical certainty, and I know you
19 understand what that means, based on a reasonable
20 medical certainty what's the conclusion? What is the
21 medical conclusion?

22 So here there is no evidence, ladies and
23 gentlemen. You've got testimony of the children
24 that's obviously inconsistent and not just, it's not
25 possible that a child doesn't know the difference in

1 day and night. This explanation that well, there are
2 two times of night is nonsensical. Not only that,
3 somehow we've gotten here that the mother was sleeping
4 in the other room when these things happened. That's
5 not the testimony that I heard. The testimony of Dawn
6 was this all happened when the mother was working.
7 When the mother was working. And Lee was there
8 keeping them. The mother didn't work. Then we got
9 the story about the aunt coming over. You'll recall
10 that because Carol testified. Autumn said that they
11 were having a fight and the Aunt Carol had to come
12 over there and separate them at their house when they
13 were fighting. That never happened. The mind of a
14 child is subject to be influenced by adults, good and
15 bad. Children, and all of us have been there,
16 sometimes believe that Santa Claus, they actually saw
17 Santa Claus and his chariot flying across the house.
18 Children can be influenced to believe that the fairy
19 tales are real. Not only that, once they're worked on
20 by the people who have them they can actually believe
21 not only, I mean they can literally believe that what
22 they saw is real. And the more they tell it the more
23 it becomes that way in their mind and that's happened
24 in this case except but it didn't stand up because
25 they couldn't keep all the elements straight and that

360

1 gives you the evidence you need to know that what
2 they're saying, number one the physical evidence does
3 support it, and what they say doesn't jive and is not
4 true.

5 Now ladies and gentlemen, I leave it with
6 you. This matter is in your hands. It's been my
7 experience over thirty-five or thirty-six years that
8 while lawyers talk a lot when juries get the case it's
9 their case and it's up to you to read this thing and
10 all I can urge you is that convicting somebody on what
11 we've heard is something that I don't believe you
12 ought to do and I hope you don't do and I hope when
13 David finishes his closing and you get the
14 instructions from the Judge that you'll return a not
15 guilty verdict in this case. Thank you for your time.

16 THE COURT: Mr. Glanzer?

17 MR. GLANZER: So it comes down to Santa Claus.
18 If you took a five, six, seven year old kid and you
19 said do you believe in Santa Claus? Oh, yeah. Why?
20 Mommy says it's true, daddy says it's true. Well,
21 have you ever seen Santa Claus? Oh, yeah, every year.
22 I go to the mall and he's there. I get to talk to
23 him. I get to tell him what I did during the year.
24 I get to tell him what I want. So Santa Clause is
25 real.

1 Is it real if somebody sticks their penis in
2 your private areas? Can you tell a child is that real
3 to believe and how do you know it's real? Do you see
4 it at the mall every week or did it happen to you?
5 Can you tell a child, don't you remember when that
6 happened to you? I don't know what you're talking
7 about. You know when the guy takes his private part
8 and -- oh, you've never seen one? And puts it in your
9 private part and you know, you do want to tell the
10 story, don't you? And the mind of a five to eight
11 year old says man, I'm really ripping to tell that
12 story. I want to tell that story, I want to come back
13 from Virginia. I want to tell people up here, first
14 of all about what he did to me and he put it in my
15 butt and he put it in my private part and I just, I'm
16 dying to tell somebody about that. And I told the
17 counselor and then let the doctor look at me and now
18 I get to go to Opelika and I get to do all that again
19 because I'm five to eight years old and this is fun.
20 This is our thing, five to eight year old's do this.
21 And come down here and the first one we call to the
22 stand can't even make it in here because she's crying.
23 And this is a premedicated crime on the part of these
24 children against this man. Who's believing in Santa
25 Claus here? Who wants you to believe in Santa Claus?

1 That guy right there.

2 What's sufficient evidence? What if you
3 left the courthouse, you're on the way to your car,
4 you're there, and all of a sudden from behind a tree
5 a guy jumps out, puts a gun in your face, says give me
6 your wallet. Here's my wallet. You come back in and
7 say I just got robbed out there. A guy just took my
8 wallet. Well, describe him. Well, he was about six
9 foot. Make you walk up and say is this the guy? And
10 you go, that's him, that's him, that's who did that to
11 me. And they go that's not enough. That's not good
12 enough, that's just your word. Your word is no good.
13 It doesn't count. Is that the way the legal system
14 works? No.

15 The statement of a rape victim, sodomy
16 victim is prima facie evidence in and of itself. That
17 means it goes to you for determination. Now what's
18 the medical evidence? You look for something to
19 corroborate. And what the medical report says, you're
20 not always going to find it in a sex case. You're not
21 always going to find it. It's going to happen but
22 there may not be proof of it. But in Autumn's case
23 there is. And we're not saying that proves that it
24 happened, we're saying it corroborates the story.
25 It's something additional. It's something that that

1 robbery victim doesn't have. Doesn't have that
2 witness to walk up and say, yeah, I saw it too. I
3 can't identify him but he was robbed. That's
4 corroboration that there was a robbery. That's
5 corroboration. That's corroboration.

6 Shane Healy took the stand. Familiar with
7 the case file. Familiar with everything that's been
8 told, done and the rest of it. How many questions did
9 they ask Shane Healy? Zero. Zero questions. But
10 when Brenda Moss took the stand who is a forensic
11 interviewer, and just interviews children to get their
12 story, they wanted her to be the case agent. Did you
13 check this out? Did you check that out. Did you
14 verify that? That's not her job. Her job is to say
15 what is your story? Tell me your story, without being
16 influenced, biased in any way. The opportunity was to
17 ask those questions to him and they didn't, because
18 they didn't want the answers.

19 What is rape one and sodomy one? Rape one
20 in this case as I said in the beginning it's a
21 statutory case. In rape you're looking for
22 penetration so slight to the vagina. So slight, it
23 can just that much. That's rape. There's no force,
24 we're not even into that. Did it happen? Children
25 under twelve over sixteen.

1 Sodomy. Two possibilities here. Deviant sexual
2 intercourse, contact between his sex organ in either
3 the mouth or the butt. How many scars are you going
4 to have in your mouth from oral sodomy? How many
5 there where he claimed it? Zero. Zero. How do you
6 prove it then physically? How are you going to prove
7 that? Saying it happened, that's not going to be good
8 enough? That's good enough. It's good enough under
9 the law.

10 Let's give you some examples of some other
11 things. A person walks into the doctor's office and
12 said I was in a car wreck and hit my head. The doctor
13 says my gosh you did. We better treat that, maybe we
14 ought to X-ray it. Car wreck. Comes back a week
15 later, well, actually my dad got mad at me and we were
16 at baseball practice, I kind of missed a few balls, he
17 took a bat and hit me up side the head. Does it
18 change the diagnosis? Not in that case, huh-uh.
19 Still hit in the head.

20 What about I fell down and hit the counter top?
21 Or next time, well, my husband and I got in an
22 argument and he punched me out. Is there a
23 difference? Does the doctor come to the same
24 conclusion that there's not injury? But it might make
25 a difference on how you analyze that injury knowing

1 the complete facts, and that's what they've said all
2 along. Every doctor, history, first and that guides
3 me on my conclusion. Without knowing the history I
4 know there's injury but I don't know what to suspect.
5 With a history it might point me another direction.
6 Straddle injury, penetration. Internal, external.
7 Big difference if you got the right story.

8 He's guilty.

9 COURT'S CHARGE

10 THE COURT: All right, ladies and gentlemen,
11 you've heard all the evidence in the case, now I'll
12 tell you what the law is that you apply to what you've
13 heard.

14 When this case was sent to this Court by the
15 Grand Jury the Defendant entered a plea of not guilty
16 to those indictments and by virtue of his entering
17 those pleas it casts the burden of proof on the State
18 of Alabama to satisfy you of his guilt beyond a
19 reasonable doubt. The Defendant comes into court
20 presumed to be innocent and that presumption stays
21 with him until such time as each one of you is
22 satisfied of his guilt beyond a reasonable doubt.

23 Now the State's burden of reasonable doubt
24 to satisfy you by a reasonable doubt can be defined in
25 several ways. A reasonable doubt is a doubt that

1 grows out of the evidence or the lack of evidence in
2 the case. It's a doubt which after you consider all
3 the evidence or lack of evidence that exists. A
4 reasonable doubt is not a doubt that's based on
5 speculation or conjecture or guesswork. In short, a
6 reasonable doubt is a doubt for which a reason can be
7 given.

8 Now in this case there are four charges as
9 I told you when we began the case. There are two
10 charges of rape and two charges of sodomy. The
11 Criminal Code of this state says this with reference
12 to the charge of rape in the first degree: A male
13 commits the crime of rape in the first degree if he
14 being sixteen years old or older engages in sexual
15 intercourse with a female who is less than twelve
16 years old. That's the legal definition of rape in the
17 first degree.

18 The two charges of sodomy in this case,
19 first degree, the Criminal Code defines that offense
20 as follows: A person commits the crime of sodomy in
21 the first degree if he being sixteen years old or
22 older engages in deviant sexual intercourse with a
23 person who is less than twelve years old.

24 Now that term deviant sexual intercourse is
25 further defined in the Criminal Code as follows: Any

1 act of sexual gratification between persons not
2 married to each other involving the sex organs of one
3 person and the mouth or anus of another. That's the
4 definition of deviant sexual intercourse.

5 Now ladies and gentlemen, you decide this
6 case based on evidence. Evidence consists of three
7 things: The testimony of the witnesses that you've
8 heard during the course of this trial, the exhibits
9 that you'll have with you in the jury room, and the
10 presumption of innocence that I have already defined
11 for you.

12 You do not consider as evidence the fact
13 that there have been indictments in the case, that is
14 not evidence of guilt. Nor should you consider the
15 arguments of the attorneys as evidence. You have a
16 right to consider what they say but that's not
17 evidence in the case. Nor any ruling that the Court
18 has made during the course of this trial.

19 Your verdicts must be unanimous, and that is
20 all twelve of you must agree on these verdicts in
21 order to return a legal verdict. We do not have
22 majority verdicts in Alabama. And when you come back
23 and these verdicts are announced in court I will ask
24 each one of you whether or not you agree with the
25 announced verdicts, and naturally, I would expect each

1 one of you to indicate to me that you do agree with
2 those verdicts.

3 Now you folks are the judges of the weight
4 to be give to this testimony and evidence. And you
5 have a right to use your good common sense in deciding
6 what weight is to be given to this testimony and
7 evidence in this case. You don't leave that at home
8 when you come up here to serve on the jury. You have
9 a right to consider what the various witnesses have
10 said, the manner in which they've testified, the
11 substance of their testimony, any interest that they
12 may have in the outcome of the case. All of those
13 things are certainly legitimate areas for you to
14 consider in deciding what weight you're going to give
15 to the testimony of each person.

16 Now if you're satisfied that any person has
17 come before you and willfully testified falsely as to
18 any material fact then you have a right to disregard
19 all of that testimony, although you do not have to.

20 I have prepared four verdict forms for you.
21 They are set out in the format as follows: In the
22 event you convict this Defendant of one of these
23 offenses, for instance the first one is sodomy in the
24 first degree of Autumn. The form of that verdict is
25 we, the jury, find the Defendant, William Lee Kirby,

1 guilty of sodomy one of Autumn Rose McLees as charged
2 in the indictment, and then a signature line for the
3 foreman. If you convict him of that charge if you are
4 reasonably satisfied beyond a reasonable doubt from
5 the evidence then the foreman would sign that verdict.

6 On the other hand, on that charge if you're
7 not satisfied beyond a reasonable doubt of his guilt
8 then you should acquit him and the form of the verdict
9 is we, the jury, find the Defendant not guilty of
10 sodomy of Autumn Rose McLees, and the foreman would
11 sign that verdict form.

12 There's a separate verdict form for the
13 charges of sodomy on both of the alleged victims, and
14 the charges of rape on both alleged victims. There
15 are places at the bottom for a finding of not guilty
16 on any one of those charges that you find to be the
17 case.

18 Now when you come back you will bring back
19 four signed verdict forms. So you need to take care
20 that you, when you sign them, whoever the foreman is,
21 that that person does that with care so that it
22 accurately reflects the result of your deliberations.

23 Now the first thing that should be done when
24 you go back to the jury room is to elect a foreman.
25 That person has two duties. First is to preside over

1 your deliberations and secondly is to sign the
2 appropriate verdict form, once you've reached a
3 decision.

4 Now once you have reached a decision in
5 these cases you knock on the door and let the bailiff
6 know, we'll bring you back here in the courtroom, they
7 will be handed to me, and I will read them in open
8 court.

9 If any questions come up during your
10 deliberations write the question out on a piece of
11 paper in as much detail as you can and if I can answer
12 it for you I will answer it for you. Just give it to
13 the bailiff if you have a question.

14 If you need to take a recess during your
15 deliberations, knock on the door and let the bailiff
16 know and we'll let you take a recess from your
17 deliberations.

18 All right. What says the State as to the
19 Court's charge? Satisfied?

20 MR. GLANZER: Satisfied.

21 THE COURT: Defense?

22 MR. FUNDERBURK: The Defendant is satisfied, Your
23 Honor.

24 THE COURT: All right. We have an alternate in
25 this case that we did not need. And the alternate is

371

1 Harry Ennis. Mr. Ennis, I'll let you stay here and
2 you folks may go out and begin your deliberations. We
3 will gather this evidence and send it out to you just
4 as quickly as we can put it together. So you may go
5 right out that door.

6 (WHEREUPON, the jury retired to the jury
7 room to begin their deliberations at 2:20
8 o'clock p.m., and at 3:45 the jury
9 announced that they had a question, and the
10 following occurred, to-wit:)

11 THE COURT: The jury has sent out a note saying
12 they want the definition of the charges of sodomy and
13 of rape. So I'll bring them back in here and read
14 them to them again.

15 (WHEREUPON, the jury returned to the
16 courtroom and the following proceedings
17 were had and done in its presence and
18 hearing, to-wit:)

19 THE COURT: You sent a note out, ladies and
20 gentlemen, you want the charges defined for you again.

21 All right rape. A very simple definition in
22 the Alabama Criminal Code, it says this: A male
23 commits the crime of rape in the first degree if he
24 being sixteen years old or older engages in sexual
25 intercourse with a female who is less than twelve

1 years old. That's the definition of rape in the first
2 degree.

3 Sodomy is as follows: A person commits the
4 crime of sodomy in the first degree if he being
5 sixteen years old or older engages in deviant sexual
6 intercourse with a person who is less than twelve
7 years old.

8 Now that term deviant sexual intercourse is
9 further defined as follows: It is any act of sexual
10 gratification between persons not married to each
11 other involving the sex organs of one person and the
12 mouth or anus of another.

13 All right. Those are the simple definitions of
14 those offenses. I'll send you back out to continue
15 your deliberations.

16 (WHEREUPON, the jury retired to the jury
17 room to continue their deliberations and at
18 4:30 o'clock p.m., the jury announced ready
19 with a verdict and the following occurred,
20 to-wit:)

21 THE COURT: I understand the jury has reached a
22 verdict. If there is anyone in the courtroom who
23 can't keep his or her emotions under control now is
24 the time to leave.

25 (WHEREUPON, the jury returned to the

1 courtroom and the following proceedings
2 were had and done in its presence and
3 hearing, to-wit:)

4 THE COURT: Have you reached verdicts, ladies and
5 gentlemen?

6 A JUROR: Yes, we do, Your Honor.

7 THE COURT: Hand it to the bailiff, please.

8 The verdicts read as follows:

9 "We, the jury, find the Defendant, William
10 Lee Kirby, guilty of sodomy one of Autumn Rose McLees
11 as charged in the indictment."

12 "We, the jury, find the Defendant, William
13 Lee Kirby, guilty of rape one of Autumn Rose McLees as
14 charged in the indictment."

15 "We, the jury, find the Defendant, William
16 Lee Kirby, guilty of sodomy one of Lillian J. McLees
17 as charged in the indictment."

18 "We, the jury, find the Defendant not guilty
19 of the rape of Lillian J. McLees."

20 Now, ladies and gentlemen, if this is the
21 verdict of each one of you would you indicate that by
22 raising your hands?

23 (All jurors raising hands.)

24 THE COURT: All right. Let the record show that
25 all jurors agree with the verdicts.

1 All right. Mr. Kirby, step around in front
2 of the bench.

3 The jury having returned verdicts of guilty
4 of two charges of sodomy and one charge of rape, it's
5 the judgment of the Court that you are guilty of those
6 offenses. I'm going to set a sentencing hearing --

7 MR. GLANZER: Judge, the State would give notice
8 of three prior convictions and request an habitual
9 offender hearing.

10 THE COURT: We'll set a hearing on February 28th
11 of next year. That will be at eight o'clock. In the
12 meantime you're in custody of the sheriff, pending
13 sentence hearing in those cases.

14 THE DEFENDANT: All right, sir.

15 THE COURT: Go right out that door.

16 (WHEREUPON, the trial proceedings were
17 concluded.)

STATE OF ALABAMA
IN THE CIRCUIT COURT FOR THE COUNTY OF LEE
THIRTY-SEVENTH JUDICIAL CIRCUIT
CRIMINAL

STATE OF ALABAMA,

PLAINTIFF,

VS.

CASE NOS. CC-01-1001
CC-01-1002
CC-01-1003
CC-01-1004

WILLIAM LEE KIRBY,

DEFENDANT

REPORTER'S OFFICIAL TRANSCRIPT OF THE
SENTENCING HEARING BEFORE THE COURT

Before:

HON. ROBERT M. HARPER, Circuit Judge, in
Courtroom Number Four of the Lee County Justice Center
located at Opelika, Alabama, on the 11th day of April,
2002, and being concluded on the same day.

A P P E A R A N C E S

HON. VANCE NICHOLAS ABBETT, District Attorney for the
37th Judicial Circuit of Alabama, and HON. DAVID GLANZER,
Assistant District Attorney for the 37th Judicial Circuit
of Alabama, appearing for the State of Alabama.

HON. KENNETH FUNDERBURK, Attorney at Law, appearing
for the Defendant.

P R O C E E D I N G S

1
2 THE COURT: All right. Appearing in open court
3 is the Defendant, William Lee Kirby and his attorney,
4 Kenneth Funderburk, in Case Number 01-001.

5 The jury having found you guilty of the
6 offense of sodomy in the first degree it's the
7 judgment of the Court that you are guilty of that
8 offense. Do you have anything to say at this time why
9 sentence of the Court should not be pronounced upon
10 you?

11 THE DEFENDANT: No, sir.

12 THE COURT: What does the State have?

13 MR. GLANZER: Judge, we have some letters from
14 the two little girl victims and their mother, and also
15 a claim for \$300.00 in restitution. And as given
16 notice prior, he does have three priors and he also
17 has three class A convictions.

18 THE COURT: Have you got evidence of that?

19 MR. FUNDERBURK: Your Honor, I need to make a
20 comment on that when you're ready.

21 THE COURT: Okay. Go ahead.

22 MR. FUNDERBURK: We just ask Your Honor, I
23 realize he does have those three but it arises out of
24 one series of events. We'd ask the Court to consider
25 treating those as one occurrence in your sentencing.

377

1 THE COURT: What's the State's position on that?

2 MR. GLANZER: Judge, we would object. When you
3 have three --

4 THE COURT: Have you talked to Mr. Abbett about
5 this?

6 MR. GLANZER: No, sir.

7 THE COURT: You might want to go do that. He
8 mentioned something to me yesterday about this that --
9 you haven't talked to him about this at all?

10 MR. GLANZER: No, sir. We've had the
11 understanding all along --

12 THE COURT: Is he here today?

13 MR. GLANZER: He is in Montgomery from what I
14 understand, or somewhere. But I've never had any
15 indication they were all going to be treated as one.

16 (An off the record discussion.)

17 THE COURT: All right. We'll put this off until
18 Mr. Abbett gets back. We'll do it tomorrow or
19 whenever we can get to it then in view of that.

20 MR. FUNDERBURK: Can we just be back in the
21 morning or --

22 THE COURT: Well, we can reset it next week or
23 two weeks, whatever you want to do.

24 MR. FUNDERBURK: Your Honor, I'm at your
25 convenience, so --

378

1 THE COURT: We'll reset this for March 14th at
2 eight o'clock. How about that?

3 MR. FUNDERBURK: Thank you, Your Honor.

4 (WHEREUPON, the proceedings were ended.)

STATE OF ALABAMA
IN THE CIRCUIT COURT FOR THE COUNTY OF LEE
THIRTY-SEVENTH JUDICIAL CIRCUIT
CRIMINAL

STATE OF ALABAMA,

PLAINTIFF,

VS.

CASE NOS. CC-01-1001

CC-01-1002

WILLIAM LEE KIRBY,

CC-01-1003

CC-01-1004

DEFENDANT

REPORTER'S OFFICIAL TRANSCRIPT OF THE
SENTENCING HEARING BEFORE THE COURT

Before:

HON. ROBERT M. HARPER, Circuit Judge, in
Courtroom Number Four of the Lee County Justice Center
located at Opelika, Alabama, on the 14th day of April,
2002, and being concluded on the same day.

A P P E A R A N C E S

HON. VANCE NICHOLAS ABBETT, District Attorney for the
37th Judicial Circuit of Alabama, and HON. DAVID GLANZER,
Assistant District Attorney for the 37th Judicial Circuit
of Alabama, appearing for the State of Alabama.

HON. KENNETH FUNDERBURK, Attorney at Law, appearing
for the Defendant.

P R O C E E D I N G S

THE COURT: All right. Appearing in Court is William Lee Kirby and his attorney, Kenneth Funderburk.

The jury has found you guilty in three cases, Mr. Kirby of sodomy in the first degree, rape in the first degree and sodomy in the first degree. Do you have anything to say at this time why sentence of the Court should not be pronounced upon you?

THE DEFENDANT: No, sir.

THE COURT: All right. Does the State have habitual offender material to be presented?

MR. GLANZER: Yes, sir. We filed notice to the Court on December 17th, 2001, of three prior convictions. They were all breaking and entering motor vehicles.

THE COURT: How many convictions?

MR. GLANZER: Three. Class C felonies, back on May 4th of 1995.

THE COURT: Okay. Well, how many separate convictions have you got there?

MR. GLANZER: Three.

MR. FUNDERBURK: Your Honor, we'd simply ask that the Court consider those as one. It was a series at one time.

1 THE COURT: What do you say about that, Mr.
2 Glanzer?

3 MR. GLANZER: My understanding is that each one
4 has to be treated separately as far as at the time of
5 the offense I think the Court can consider them as
6 concurrent for sentencing purposes, but as far as
7 habitual offender they should be counted individually.

8 MR. FUNDERBURK: We understand that would be the
9 case, but the Court does have the power and authority
10 on the sentencing phase to treat them as one offense.

11 THE COURT: Okay. Anything else to be presented
12 by either side today?

13 MR. GLANZER: Judge, we are pending still from
14 the mother and the two children the travel costs of
15 coming to trial as well as some counseling costs that
16 are going on in Virginia, so we would ask that that be
17 left pending.

18 MR. FUNDERBURK: And we're not going to dispute
19 that, Your Honor, whenever they come up with a figure.

20 THE COURT: Okay. Anything else by either side?

21 MR. FUNDERBURK: No, sir, Your Honor.

22 THE COURT: It's the sentence of the Court you be
23 confined in the penitentiary of the State of Alabama
24 for a term of sixteen years in each case to run
25 concurrent, pay court costs, pay a victim's

1 restitution assessment of \$50.00 in each case.
2 Restitution will just remain pending. How long have
3 you been in jail on this, Mr. Kirby?

4 THE DEFENDANT: Four and a half months.

5 THE COURT: All right. I'll give you credit for
6 four and a half months.

7 You have a right to appeal. If you can't
8 afford an attorney one would be appointed for you and
9 you'd be given a free transcript.

10 Anything else today?

11 MR. GLANZER: No, sir.

12 MR. FUNDERBURK: No, sir, Your Honor.

13 THE COURT: You're in custody of the sheriff.

14 (WHEREUPON, the sentence hearing
15 proceedings were ended.)

C E R T I F I C A T E

STATE OF ALABAMA)

LEE COUNTY)

I, Willie T. Bennett, Official Court Reporter at Opelika, Alabama, do hereby certify that I reported in shorthand the proceedings and testimony in the foregoing styled cause at the time and place stated in the caption hereof; that I later reduced my shorthand notes to typewriting; or the same was done under my supervision; that the foregoing pages beginning with the word "Proceedings", where the same appears in the center of the page, following the style of the case, the caption and the appearances, contain a full, true and correct transcript of the proceedings and testimony as therein set out.

I FURTHER CERTIFY that I have placed in the Court File all of the exhibits offered in said trial in the order offered, which fact is certified to the Clerk of the Court.

I FURTHER CERTIFY that I have on this date notified counsel for the parties of the filing of this transcript in the Office of the Clerk of the 37th Judicial Circuit of Alabama, Law Division.

384

THIS 30th day of July, 2002.

William T. Bennett
OFFICIAL COURT REPORTER

FILE

JUL 30 2002

IN OFFICE
CORINNE T. HURST
CIRCUIT CLERK